Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

COASTAL FUELS OF PUERTO RICO, INC.,
Cross-Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,
Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, as the First Circuit held, no rational jury could infer, from uncontroverted evidence that a seller has engaged in persistent and competitively significant price discrimination, that the seller had monopoly power in the relevant market pursuant to Section 2 of the Sherman Act, 15 U.S.C. § 2, notwithstanding decisions of this Court and other courts of appeals to the contrary?

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, cross-petitioner states the following:

> Coastal Fuels of Puerto Rico, Inc., a Delaware corporation, is a subsidiary of Coastal Fuels Marketing, Inc., a Delaware corporation. Coastal Fuels Marketing, Inc. is a subsidiary of Cosbel Petroleum Corporation, a Delaware corporation, which is a subsidiary of The Coastal Corporation, a publicly traded Delaware corporation.

PARTIES

There are no parties to this proceeding other than the named parties, *i.e.*, Coastal Fuels of Puerto Rico, Inc. and Caribbean Petroleum Corp.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

For the reasons stated in its opposition to the petition for certiorari filed by Caribbean Petroleum Corp. ("CAPECO"), cross-petitioner Coastal Fuels of Puerto Rico, Inc. ("Coastal") believes that the Court should not review this case. Nevertheless, in the event the Court grants CAPECO's petition, Coastal respectfully requests that this Court grant its cross-petition for certiorari. The court below vacated a jury verdict of monopolization for lack of proof of defendant's monopoly power, while simultaneously affirming a finding that CAPECO engaged in sustained, competitively significant price discrimination. That self-contradictory ruling is irreconcilable with decisions of this Court and of at least one other circuit, and with sound, widely accepted antitrust principles. Until the

decision below, the law was clear that a finding of sustained, competitively significant price discrimination is itself direct evidence of very strong market power sufficient to support a judgment of liability under the Sherman Act. *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992); *cf. Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). At a minimum, because CAPECO's petition necessarily presupposes that the court of appeals correctly decided the Sherman Act claim, consideration of the issue raised in this cross-petition is essential to the fair resolution of the question presented in the petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 79 F.3d 182 (1st Cir. 1996). The opinion is reproduced in the Appendix to the petition for certiorari ("Pet. App."), beginning at page 1a. The opinion of the court of appeals denying rehearing is unpublished, and is reproduced at Pet. App. 42a. The unpublished opinion of the District Court appears at Pet. App. 41a.

JURISDICTION

The court of appeals entered judgment on March 12, 1996, and denied cross-petitioner's petition for rehearing on April 3, 1996. The cross-respondent filed a petition for a writ of certiorari that was docketed on July 5, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statute involved in this case is Section 2 of the Sherman Act, 15 U.S.C. § 2. Section 2 provides, in full, as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

> person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Section 2 is enforceable in a private action for treble money damages by virtue of Section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 provides, in relevant part, that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

STATEMENT OF THE CASE

The facts of this case relevant to price discrimination, as found by the jury in favor of the cross-petitioner, are set forth on pages 2-6 of Coastal's Brief in Opposition to the petition for certiorari. For the Court's convenience, certain of those facts directly relevant to the cross-petition, as well as certain additional facts supported by the record, are set forth below.

FACTUAL BACKGROUND

Before October 1991 to April 1993, two companies supplied marine fuel oil ("bunker fuel") to cruise ships and other ocean-going vessels in San Juan, Puerto Rico. These were Caribbean Fuel Oil Trading, Inc. ("Caribbean") and Harbor Fuel Services, Inc. ("Harbor"). Caribbean and Harbor obtained 90% of their bunker fuel from Caribbean Petroleum Corp. ("CAPECO"), which operated the only oil refinery near the Harbor which supplies residual and diesel fuel to marine fuel suppliers.

A.1159.* Coastal Fuels of Puerto Rico, Inc. ("Coastal") began operations in October 1991 and likewise purchased its residual and diesel fuel oil from CAPECO.

At all times relevant to this suit, CAPECO was the only reasonably available source of supply to marine fuel suppliers in San Juan Harbor. The only other local refinery from which San Juan could be served, the Sun Oil refinery, almost always sold all of its residual fuel oil to preexisting customers. A.1083; A.1295-96.

As for refineries outside of Puerto Rico, obtaining significant supplies from them was commercially impracticable. In theory, resellers could have fuel imported to them and, upon taking delivery, transport the fuel to ships at berth in San Juan Harbor. A number of external factors, including significant transportation costs (approximately $1.00 per barrel, A.1135) storage costs (roughly 30 cents per barrel, A.1066), and taxes made importing supply prohibitively expensive. In particular, a Puerto Rico import tax of $5.00 per barrel, levied on all imported fuel not sold within fifteen days of being imported, put enormous pressure on a supplier to sell imported fuel before the tax was applied. A.1063-64; A.1278-81; A.2083. The devastating effect of the tax and volatile fuel oil prices is illustrated by Coastal's ill-fated importation of supply in December 1991. A.1278-81; A.1345-46; A.2083. In that month, as a result of CAPECO's false statements that CAPECO lacked adequate inventory to meet Coastal's supply needs (A.1071-74; A.1083), Coastal imported 90,000 barrels at a price of $13.40 each. *Id.* By the time the product arrived, however, prices had declined to $10.00 a barrel. With the fifteen-day clock running out, Coastal could not wait out the dip in the

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* All citations to "A." refer to the Appendix filed in the court of appeals below. All other record citations refer to materials which appear elsewhere in the record below. Citations to "Pl.'s Ex." refer to the exhibits submitted plaintiff, and citations to "Wales, Coastal Addendum" refer to the deposition of Robert Wales (Dec. 7, 1993).

market, and had to sell the product at losses to avoid even greater losses if it kept the product long enough for the tax to be imposed. *Id.* As a practical matter, therefore, CAPECO was the only source of residual fuel to Coastal and its competitors.

CAPECO exploited its position as the sole supplier of residual fuel in San Juan by raising prices to supra-competitive levels, both before and after Coastal entered the fuel oil market, thereby squeezing the resellers' earnings to the limit. A.1159-65; A.1219-20. In the 1991 fiscal year, for instance, Harbor's sales volume increased more than 27%, but its pre-tax earnings to sales ratios dwindled from 0.32% in 1990 to 0.06% in 1991. Pl.'s Ex. 52. In dollars, this translated into a decline from $91,868 to $21,545. *Id.* During the same period, Caribbean's pre-tax earnings to sales decreased to 0.69%. Pl.'s Ex. 36. The helplessness of Harbor and Caribbean at CAPECO's hands is further illustrated by the new contract terms CAPECO imposed in October 1991. Despite the increasingly squeezed bottom line of the two suppliers, CAPECO demanded—and obtained—a twenty-five cents per barrel increase in prices. A.1828-35.

These continued increases in prices occurred even though the ships that refueled in San Juan, in theory, could purchase fuel in a number of other ports they visited throughout the Caribbean and along the southeastern seaboard of the United States. A.301-02. Price competition among suppliers of bunker fuel within San Juan Harbor was so tight that a mere five cents per barrel price differential was competitively significant. A.826. The mobility of cruise ships did not prevent CAPECO from imposing price increases because cruise ships prefer for various logistical reasons to refuel between trips in their "home port." A.2284. As a consequence, ships with their home port in San Juan endured significant price increases in order to refuel in San Juan Harbor. For example, on July 1, 1992, Puerto Rico imposed a tax

increase of 84 cents per barrel on bunker fuel sales in San Juan. Even though the tax increase was many times higher than the five cents per barrel that was competitively significant within San Juan, the vast majority (75%) of ships continued to refuel in San Juan Harbor. A.1429.

The fortunes of Caribbean and Harbor improved in the Fall of 1991 when CAPECO began to direct its monopoly power against Coastal. Coastal was of concern to CAPECO because CAPECO believed (incorrectly) that Coastal, with its affiliated refinery in Aruba, would be able to import bunker fuel from Aruba. Wales, Coastal Addendum, at 7-8. CAPECO perceived that such competition would inevitably cut into CAPECO's own sales, and impose upon CAPECO the expense of exporting some of its residual fuel oil for sale outside San Juan. *Id.*; A.302-03.

To preempt such competition, CAPECO first proposed to Coastal an agreement in which Coastal would purchase all of CAPECO's daily production of residual oil. Wales, Coastal Addendum 2-3; A.1595; A.860-62; A.1164. When Coastal rejected that proposal, CAPECO embarked on an anticompetitive course of conduct aimed at destroying Coastal as a competitive force in San Juan. In addition to the price discrimination already discussed, CAPECO engaged in such related discriminatory conduct as: lying about product availability; discriminating against Coastal in scheduling liftings at the CAPECO dock; providing a lower quality residual to Coastal than to its competitors; and eventually refusing outright to deal with Coastal.

By May of 1992, Coastal had learned of CAPECO's price discrimination in favor of its competitors and had filed this antitrust lawsuit. After successfully avoiding preliminary injunctive relief in the lower courts, CAPECO notified Coastal on March 31, 1993, that it would no longer supply Coastal. Pl.'s Ex. 223. The cut-off oc-

curred, as CAPECO's Managing Director admitted, because Coastal "continued pressing on th[is] litigation." A.1617. Having been bled to death by price discrimination, denied injunctive relief and, eventually, cut off entirely, Coastal went out of business in April 1993. A.875-76.

PROCEDURAL BACKGROUND

1. In its complaint against CAPECO, Coastal alleged, *inter alia*, that CAPECO had (1) engaged in monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 260 of Title 10 of the Laws of Puerto Rico; and (2) discriminated in price in violation of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and in violation of Section 263(a) of Title 10 of the Laws of Puerto Rico. The parties agreed that the relevant product for purposes of the antitrust claims was bunker fuel. They disagreed, however, as to the proper definition of the geographic market. Coastal argued that San Juan was the relevant market; CAPECO disagreed, arguing that the relevant market also included ports in the Caribbean and the southeastern seaboard of the United States. Coastal's submission was supported by expert testimony; CAPECO's, however, was not. The jury heard the evidence and after proper instructions and via a special verdict, under Fed. R. Civ. P. 49(a), specifically agreed with Coastal that San Juan was the relevant market. The jury found in favor of Coastal on the federal and local monopolization and price discrimination claims.

2. The United States Court of Appeals for the First Circuit reversed the monopolization verdict, which is at issue in the conditional cross-petition. 79 F.3d 182 (1996) (Pet. App. 1a). The court of appeals (per Torruella, C.J.) began its analysis on solid ground. The court correctly noted that on appeal it was required to " 'affirm the jury's conclusion [as to market definition] unless the record is devoid of evidence upon which the

jury might reasonably base its conclusion.'" Pet. App. 23a (citation omitted). It also stated, correctly, that "[a] plaintiff can either show direct evidence of market power (perhaps by showing actual supracompetitive prices and restricted output) or circumstantial evidence of market power." Pet. App. 23a-24a. From those sound premises, however, the court reached the erroneous conclusion that "it would be unreasonable for a juror to infer from the evidence presented that the sales of residual oil for bunker fuel outside of San Juan should be excluded from the relevant market." Pet. App. 25a.

Despite the ample direct evidence that CAPECO had exercised the power to control price and output of residual fuel in San Juan, including evidence of substantial price discrimination and supracompetitive pricing, the court ruled that CAPECO lacked power to control prices. The Court reasoned that "[o]cean-going vessels can go anywhere in the Caribbean and Southeastern United States to get their bunker fuel. If CAPECO were to raise its prices to the resellers, the resellers could not offer the bunker fuel to the ocean-going vessels at competitive prices and the ocean-going vessels would simply get their fuel at another port." Pet. App. 27a. On this reasoning, the court explained that the result of price hikes from CAPECO would be that "resellers would either stop purchasing residual fuel or cease business" and that "CAPECO would then lose its ability to sell its residual oil for bunker fuel." Pet. App. 27a. Thus, the court substituted in place of the jury's market definition CAPECO's expansive view of the relevant market, in which, it ruled, the court had not been shown "that CAPECO had a dominant market share." Pet. App. 27a. Accordingly, the court reversed the federal and state monopolization verdicts. The court then denied Coastal's petition for rehearing on April 3, 1996. Pet. App. 42a. In a brief unpublished opinon, the Court rejected evidence of CAPECO's exercise of market power, holding that "the evidence, while perhaps reconcilable with

a monopolistic market in San Juan, could also be justified otherwise." Pet. App. 44a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The court of appeals expressly acknowledged the uncontroverted evidence that cross-respondent CAPECO consistently engaged in "competitively significant" price discrimination for the entire eighteen months that Coastal stayed in business. Pet. App. 16a-17a. Nevertheless, the court ignored this glaring, direct evidence of market power and set aside a jury verdict finding CAPECO liable for monopolization, on the ground that Coastal failed to provide adequate circumstantial evidence of monopoly power. The court's reasoning is illogical on its face and contrary to settled law. Sustained price discrimination is potent evidence that the seller has market power and, as such, obviates the need for inferring market power indirectly through the calculation of market share. *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). The court of appeals' ruling to the contrary is in conflict with these controlling decisions of this Court, with decisions of at least one other circuit, and with sound antitrust policy. At the very least, review of the court of appeals' erroneous reversal of the monopolization claim would be necessary to permit this Court to give full and fair consideration of the issue CAPECO has sought to raise in its petition.

THE RULING OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURTS.

A monopolization claim under Section 2 of the Sherman Act "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distin-

guished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Monopoly power, in turn, is defined as "the power to control prices or exclude competition." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

The court below ruled that no reasonable jury could find that CAPECO had monopoly power. This is incorrect. Indeed, precisely the opposite is true. Given the undisputed facts accepted by the court of appeals, no reasonable jury could have failed to find CAPECO liable for monopolization under the Sherman Act.

1. It is hard to imagine a more telling demonstration of monopoly power than that which CAPECO exhibited in this case. CAPECO was able to impose significantly discriminatory price terms on Coastal for eighteen months and, ultimately, to drive Coastal out of business, even though Coastal knew about the discrimination for eleven of these months during which it had sued CAPECO in an effort to bring the unlawful conduct to a halt. These facts —acknowledged by the court of appeals—alone demonstrate that CAPECO had the power to control price and to exclude competition in San Juan.

In assessing whether a plaintiff has made a sufficient showing of market power, the bedrock principle is that established by this Court in *Federal Trade Commission* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986). There, the Court held that, where there is direct evidence of monopoly power, "failure to engage in detailed market analysis is not fatal." *Id.* at 460. The Court explained: "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry

into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61 (quoting VII Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

It also is clear that price discrimination is strong direct evidence of market power. In *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), a seller of copying equipment sought summary judgment against a claim that it had unlawfully tied sales of parts with sales of service, on the ground that it lacked market power in the broader equipment market. This Court rejected that claim, ruling that market power in the "aftermarkets" for parts and service could be inferred from Kodak's ability to engage in price discrimination in the aftermarkets, and that monopoly power could further be inferred from evidence that Kodak had between an 80 and 100 percent share of these markets. *Id.* at 475-78, 481.

Consistent with *Kodak*, the Eleventh Circuit has held that the narrower of two potential definitions of the relevant product market must be selected when there is evidence of "severe price discrimination" in that market. *U.S. Anchor Mfg., Inc.* v. *Rule Indus., Inc.*, 7 F.3d 986, 996-98 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2710 (1994). In so holding, the court relied upon "the general proposition that the ability to discriminate against a distinct group of customers by charging higher prices for otherwise similar products demonstrates the existence of market power with respect to that group." *Id.* at 998. At least two other courts of appeals have recognized the validity of this general proposition. See *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 671 (7th Cir. 1985) (Easterbrook, J.) ("the practice of price discrimination [is] impossible unless the seller has substantial market power"), *cert. denied*, 475 U.S. 1129 (1986); *United States* v. *Eastman Kodak Co.*, 63 F.3d 95, 106 & n.6 (2d Cir. 1995). By ruling that no reasonable jury could infer from the evidence of sustained, competitively

significant price discrimination that CAPECO had monopoly power, the First Circuit reached a result inconsistent with the foregoing precedents.

The court of appeals acknowledged the principle of *Indiana Federation of Dentists* as a formal matter but, in applying it, missed the forest for the trees. In its initial opinion, the Court ignored the evidence of actual anticompetitive effects to competition among suppliers in San Juan Harbor. Instead, the court redefined the relevant market to include all ports in the Caribbean and southeastern United States, reasoning that the ability of oceangoing vessels to refuel in those ports would constrain CAPECO's ability to raise prices for residual and diesel fuel to the suppliers in San Juan Harbor, and thus preclude the exercise of market power. Pet. App. 27a. The court then affirmed its reasoning on rehearing, albeit with a grudging admission that Coastal had submitted evidence that was "reconcilable with a monopolistic market in San Juan." Pet. App. 44a.

The court of appeals' market definition makes no economic sense and is legally erroneous. As this Court has explained, the geographic market is "the market area in which the seller operates, and to which the *purchaser can practicably turn for supplies*." *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (emphasis added). It is obvious on this record that marine fuel suppliers in San Juan could not "practicably" turn to anyone other than CAPECO for supplies. See *supra* pp. 4-5. The evidence also showed that cruise ships preferred their home port and that ships in San Juan were willing to accept significant price increases in order to refuel there. That, in turn, is why CAPECO was able to sustain competitively significant price discrimination for eighteen months. Coastal, which knew about the discrimination for almost a year, obviously would have purchased its residual and diesel fuel elsewhere if it could have profitably done so. But as the record dramatically showed, Coastal simply had no practical alternative.

This case thus aptly illustrates why, as Judge Easterbrook put it, "the practice of price discrimination [is] impossible unless the seller has substantial market power." *Will*, 776 F.2d at 671. Purchasers aware of such price discrimination by a non-monopolist can and will, in a competitive market, turn to other sellers. Purchasers who have no such alternatives, however, are by definition at the mercy of the seller, who therefore possesses power over price. Where, as here, the purchasers are dependent upon *one* seller, that seller has monopoly power.

Consistent with these economic realities, the agencies charged with enforcing the antitrust laws, the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission, will narrowly define relevant product and geographic markets when presented with evidence that a seller has engaged in or could engage in significant price discrimination. See *Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* §§ 1.12, 1.22, 1.43, 62 Antitrust & Trade Reg. Rep. (BNA) (Special Supp. Apr. 2, 1992).

The agencies' position finds ample support not only in the precedent of this Court and the courts of appeals, but also in the antitrust literature. Leading commentators recognize that "persistent price discrimination cannot occur unless the seller has market power." Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 14.6a, at 524 (1994). Consequently, "[i]f price discrimination persists in a market over a long period, the inference can be drawn that the firm practicing it possesses substantial market power." Lawrence A. Sullivan, *Antitrust* 89 (1977). See also, *e.g.*, IIA Phillip E. Areeda, *Antitrust Law* § 522, at 125 (1995) (explaining that price discrimination "can usefully show the existence and degree of market power"); *id.* § 534d, at 183-85 (price discrimination is relevant to market definition); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805 (1990)

(market boundaries should be drawn narrowly if the seller can price discriminate). These analyses reflect the fact that, although some sellers may be able for relatively short intervals to exploit a buyer's unawareness of price discrimination, the ability to impose discriminatory prices over an extended period of time and against the buyer's will is impossible unless the seller has substantial market power. Thus, the court of appeals' conclusion that it was irrational for the jury to infer that CAPECO had market power is itself irrational from an economic perspective and erroneous as a matter of law.

2. The court of appeals' decision is all the more troubling because the record below was replete with direct evidence beyond price discrimination of CAPECO's monopoly power—*i.e.*, its ability to control price and output and exclude competitors—and of the detrimental economic effects to competition that CAPECO's exercise of such power produced. In particular, there was direct evidence that CAPECO forced its purchasers to accept supracompetitive prices, artificially restricted output, and excluded competitors from the market. The following examples provide further confirmation, if any were needed, of the lower court's legal error.

a. *Supracompetitive pricing.* Both before and after Coastal entered the market, CAPECO charged supracompetitive prices for bunker fuel. A.1159-65; A.1219-20. Even though the profits of Harbor and Caribbean were steadily being eroded down to insignificant levels, in October 1991 CAPECO forced them to pay an additional 25 cents per barrel. A.1828-35. The fact that they acquiesced in CAPECO's unreasonable demand for a price increase and continued to purchase from CAPECO indicates that they, like Coastal, lacked the alternative sources of supply that characterize a competitive market.

b. *Restrictions on output.* CAPECO continuously refused to make sales of fuel oil to Coastal even though

it had available supply. A.2082-83. Indeed, for eight consecutive weeks, CAPECO avoided making sales to Coastal by falsely insisting that further inventories were unavailable due to a labor dispute. A.1071-74; A.1083. Even when CAPECO resumed deliveries, it refused to sell to Coastal at anywhere near the levels Coastal requested (*e.g.*, A.1998-2002; A.2084) or the levels provided to Coastal's competitors (Pl.'s Ex. 218). In fact, in May 1992, CAPECO flatly imposed an arbitrary limit of 60,000 barrels per month on Coastal, in spite of Coastal's stated willingness to purchase upwards of 90,000 barrels monthly. Pl.'s Ex. 159. Clearly, the only reason for not selling to Coastal would be to restrain competition. CAPECO, at all relevant times, charged Coastal substantially more for each barrel of bunker fuel than it charged Coastal's competitors. A.1380-98. As a result, if CAPECO was concerned with maximizing its revenues, which it obviously would have been except for its predatory intent to drive Coastal from the marketplace, CAPECO would have *increased* sales to Coastal. That it did precisely the opposite (and, therefore, lost revenues while pursuing its plan to drive Coastal out of business in San Juan) clearly suggests that the market was not functioning properly, *i.e.*, competitively.

c. *Exclusion of competitors.* It was undisputed at trial that CAPECO's main objective was to exclude from San Juan a supplier with an affiliated refinery that, in CAPECO's view, would have the power to challenge CAPECO's monopoly position. Wales, Coastal Addendum, at 7-8. By driving Coastal out of business, CAPECO ensured that such competition would not occur.

Given this evidence of CAPECO's direct exercise of market power, the court of appeals' error in reversing the judgment of liability under the Sherman Act is all the more apparent.

3. Finally, implicit in the question raised in CAPECO's petition is the assumption that the court of appeals'

decision on monopolization was correct. CAPECO's argument is that the standards for proof of injury to competition in a secondary-line price discrimination case should be entirely or largely the same as those imposed under the Sherman Act. CAPECO's contention becomes, of course, purely academic if CAPECO engaged in monopolization and thus injured competition. Thus, in the event this Court were to grant CAPECO's petition, the Court should also grant the cross-petition to ensure that it is able to give full and fair consideration to all the issues relevant to the question CAPECO presents.

CONCLUSION

For the reasons set forth in Coastal's Brief in Opposition, CAPECO's petition for certiorari should be denied. In the event that petition is granted, however, Coastal's conditional cross-petition for certiorari should also be granted.

Respectfully submitted,

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August 5, 1996

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IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

COASTAL FUELS OF PUERTO RICO, INC.,

Cross-Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

Caribbean Petroleum Corporation is a subsidiary of Oil Resources International, Ltd., a British Virgin Island international business company, which is a subsidiary of First Oil International, Ltd., a British Virgin Island international business company. Caribbean Petroleum Corporation does not own a controlling interest in any subsidiary corporation. Caribbean Petroleum Corporation owns ninety-nine percent (99%) interests in two Delaware limited partnerships, Caribbean Petroleum Limited Partners and Caribbean Petroleum Refinery Limited Partners.

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The Conditional Cross-Petition for Writ of Certiorari filed by Coastal Fuels of Puerto Rico, Inc. ("Coastal") presents no issue worthy of review by this Court. The court of appeals' holding that the relevant geographic market for the sale of marine fuel to ocean-going vessels calling on the Port of San Juan includes the Caribbean and the southeastern United States is both correct and unremarkable. Ships plying these waters can and do move. They buy marine fuel from many different suppliers operating in ports located throughout this region.

The decision by the court of appeals presents no conflict with decisions by other courts of appeals, and is based on well-settled principles of antitrust law. At most, Coastal presents a challenge to the court of appeals' factual finding about the relevant geographic market. Coastal is wrong on the mer-

its. More fundamentally, such a challenge does not support the grant of Coastal's conditional cross-petition.

DECISION BY THE COURT OF APPEALS

The court of appeals correctly stated and applied the existing law on Coastal's Sherman Act claim, as follows:

> The touchstone of market definition is whether a hypothetical monopolist could raise prices. *See Rebel Oil Co.*, 51 F.3d at 1434. Although a reseller based in San Juan may have nowhere to turn to in San Juan for its fuel, Coastal did not produce sufficient evidence that this meant CAPECO has the ability to restrict supply and raise prices in San Juan to supracompetitive levels. Indeed, the evidence points in the other direction. CAPECO cannot sell its residual oil for bunker fuel unless it does so at a price at which the resellers will be able to sell the fuel to its ultimate consumers, the ocean-going vessels. Those ocean-going vessels can go anywhere in the Caribbean and Southeastern United States to get their bunker fuel. If CAPECO were to raise its prices to the resellers, the resellers could not offer the bunker fuel at competitive prices and the ocean-going vessels would simply get their fuel at another port.

Pet. App. 26a-27a. In ruling on Coastal's petition for rehearing, the court of appeals again correctly stated and applied existing law. Pet. App. 42a.

REASONS TO DENY THE CONDITIONAL CROSS-PETITION

Coastal's cross-petition is nothing more than a proforma appeal of a well-reasoned and well-supported decision by the court of appeals. No important issue of law or fact is presented that would merit this Court's review. Coastal's arguments also are fatally flawed on the merits.

The holding by the court of appeals that the relevant market for Coastal's monopolization claim includes the Caribbean and the southeastern United States is fully supported by the record. Ocean-going ships can purchase fuel in any number of ports within this market on which they call. *E.g.*, A. 721-722, 1188-1190. The price that can be charged for fuel oil in San Juan is constrained by the price charged in other ports. A. 1323-1324. Since suppliers in other ports compete for the business of providing fuel oil to the same ocean-going ships, the relevant geographic market for Coastal's Sherman Act claim necessarily includes those other ports. *Compare Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1336-37 (7th Cir. 1996) (cited by the court of appeals at Pet. App. 27a).

Under Section 2 of the Sherman Act, Coastal had the burden to prove that CAPECO had monopoly power in the relevant market. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992). Market power in this sense is the ability of a supplier to raise prices above competitive levels, for example by cutting back the total output of a product available to the market and thereby causing its price to rise. *Id.* at 464; *Ball Memorial Hospital, Inc.*, 784 F.2d at 1331 (citing, *inter alia*, *NCAA v. University of Oklahoma*, 468 U.S. 85 (1984); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). Lowering prices to predatory levels, i.e., to levels below cost, may also be indicative of market power violative of the Sherman Act *so long as* the supplier has a dangerous probability of recovering its foregone profits by raising prices in the future. *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2588 (1993).

Coastal did not introduce evidence that CAPECO raised its prices above competitive levels in the relevant market. Rather, its evidence consisted almost exclusively of prices in San Juan alone. As the court of appeals correctly found, however, the prevailing prices in the relevant market, the Carib-

bean and southeastern United States, curtailed the prices that could be charged for fuel in San Juan. *E.g.*, A. 721-722, 1188-1190, 1191-1193. Coastal introduced no evidence to the contrary. Similarly, Coastal introduced no evidence that CAPECO charged predatory prices, i.e., prices below its cost of production. *E.g.*, A. 496, 616, 624, 709-10, 726-27. The mere fact that Coastal introduced some evidence that CAPECO charged customers lower prices from time to time does not establish the existence of market power under Section 2 of the Sherman Act. *Brooke Group, Ltd.*, 113 S. Ct. at 2588. *See also Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989). Coastal's failure to prove that CAPECO exercised or had the ability to exercise monopolistic market power is fatal to its Sherman Act claim. *See Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 671 (7th Cir. 1985) ("[P]laintiffs] did not establish market power. They failed as a matter of law. This failure makes every other element of the anti-trust case irrelevant."), *cert. denied*, 475 U.S. 1129 (1986).

Coastal argues that the bare existence of different prices charged by CAPECO over time is sufficient to prove the requisite monopoly power. Coastal's argument fails for at least two reasons. First, different prices alone do not establish a claim under Section 2 of the Sherman Act. *Brooke Group, Ltd.*, 113 S. Ct. at 2588; *Monahan's Marine, Inc.*, 866 F.2d at 528, 529. In order to prevail, Coastal had to prove that CAPECO charged either supracompetitive prices or unnaturally low prices with a dangerous probability of recoupment by charging higher prices in the future. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995). Coastal failed to meet its burden of proof in either respect.

Second, there was no evidence that CAPECO had the ability to *raise* prices above competitive levels. Indeed, the evidence was to the contrary -- the price that could be charged for fuel oil in the Port of San Juan was constrained by the

prices charged in other ports. A. 1323-1324. No inference of market power, and no Sherman Act violation, arises from CAPECO's charging *lower* prices to some customers but not others, particularly in the absence of any evidence that CAPECO's prices were set below cost. *Brooke Group, Ltd.*, 113 S. Ct. at 2588-89. *See generally Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231, 235 (1st Cir. 1983). There is no conflict between the court of appeals' finding of no market power in this situation and the cases cited by Coastal in its Cross-Petition, which uniformly involved higher-than-market prices.

Coastal argues that its competitors' profit margins were eroded down to insignificant levels because of higher prices being charged to them by CAPECO. *See* Conditional Cross-Petition, at 14. This argument demonstrates that the prices CAPECO could charge were constrained by competition within the relevant market, since by its own argument neither Coastal nor its competitors could charge higher-than-market prices to the cruise ships that bought the bunker fuel.

CONCLUSION

Coastal's Conditional Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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